A

TENAGA NASIONAL BHD

v.

EE-LIAN PLASTIC INDUSTRIES (M) SDN BHD

B

HIGH COURT MALAYA, PULAU PINANG
VARGHESE GEORGE VARUGHESE J
[CIVIL SUIT NO: 22 NCVC-423-2011]
30 JANUARY 2013

C ***PUBLIC UTILITIES:*** *Electricity - Consumption and usage - Under recording of actual consumption - Tampering of meter - Allegation of - Loss of revenue - Claim for - Offence has to be shown to have been committed to premise claim in civil proceedings pursuant to s. 38 of the Electricity Supply Act 1990 - Whether there was prosecution or conviction*
D *of defendant for offence - Whether plaintiff precluded from recovery of sums - Whether plaintiff could sustain civil claim in law since specific precondition under s. 38(3) Electricity Supply Act 1990 not satisfied*

PUBLIC UTILITIES: *Electricity - Consumption and usage - Under*
E *recording of actual consumption - Tampering of meter - Allegation of - Claim for loss of revenue - Suit a civil action brought pursuant to s. 38 Electricity Supply Act 1990 - Whether separate from criminal proceedings under s. 37 of the Electricity Supply Act 1990 - Whether court the proper forum to make determination of whether there was tampering*

F The plaintiff, a supplier of electric power as a licensee under the Electricity Supply Act 1990 (ESA), sought to recover from the defendant, a consumer of electricity that was supplied by the plaintiff at the defendant's industrial premises ('defendant's premises'), the sum of RM1,027,888.76 as loss of revenue
G occasioned to the plaintiff. The plaintiff's claim was expressly put forward as one brought pursuant to or premised upon s. 38(3), (4) and (5) of the ESA. It was the plaintiff's case that an inspection had been carried out at the defendant's premises by employees of the plaintiff. It was thereat found that the meter
H and/or meter installation at the defendant's premises to record the consumption or usage of electricity by the defendant had been tampered with and was not recording the actual usage of power. It was alleged that the defendant had interfered with the meter or metering installation and prevented it from recording the proper
I or actual consumption of electricity at the defendant's premises. The defendants, however, denied any knowledge of the alleged

'tampering'. The defendant also stated that it had not been prosecuted for any offence (theft of electricity), much less called to make any statement on the matter to the police or any relevant authority. The issues that arose herein were *inter alia* (i) whether there was tampering of the meter resulting in the 'under recording' of the actual consumption of electricity at the defendant's premises and whether it was for this court to determine the same; (ii) whether the plaintiff was entitled pursuant to s. 38(3) ESA to recover any such loss of revenue even if so established by virtue of s. 38(4) and (5) of the ESA.

Held (dismissing plaintiff's claim):

(1) This instant suit was a civil action being brought and prosecuted pursuant to s. 38(3), (4) and (5) of the ESA, a statutorily provided cause of action to recover loss of revenue by civil proceedings. This was intended to be separate from the criminal proceedings under s. 37 of the ESA. Thus, it was not for this court (adjudicating a claim in the civil action brought before it) to determine or make a finding whether there was or was not an offence committed under s. 37(1), s. 37(3) or s. 37(14) ESA. This court was not the proper forum to make a determination of whether there was a 'tampering' of meter or meter installation as alleged or not. (paras 19-21)

(2) The plaintiff was precluded from any recovery of the sums claimed in this action. Recoverability by the plaintiff of any loss of revenue, by way of a civil action, required or presupposed that there was a prior conviction under s. 37(1), s. 37(3) or s. 37(14) ESA. An offence had to be shown to have been committed to premise the claim in the civil proceedings to be brought against the 'offender' pursuant to s. 38(3), s. 38(4) and s. 38(5) of the ESA. There was no such prosecution or conviction of the defendant for an offence under s. 37(1), s. 37(3) or s. 37(14) ESA in the instant case. Accordingly, the plaintiff could not sustain this civil claim in law, since the specific precondition to avail of the statutory cause of action under s. 38(3) of the ESA had not been met or satisfied. (paras 33-34 & 36)

Case(s) referred to:
Claybricks & Tiles Sdn Bhd v. Tenaga Nasional Bhd [2006] 4 CLJ 892
Tenaga Nasional Berhad v. JCY HDD Technology Sdn Bhd [2012] 1 LNS 168 HC

Legislation referred to:
Electricity Supply Act 1990, ss. 10, 11, 16, 37(1), (2), (3), (4), (5), (6), (7), (8), (9), (10), (11), (12), (13), (14), (15), (16), 38(1), (1A), (2), (2A), (3), (4), (5), 41

For the plaintiff - Fatima Idris; M/s Idris & Assocs
For the defendant - Simon Tan Hong Jin; M/s Aswar Simon & Azhar

Reported by Suhainah Wahiduddin

JUDGMENT

Varghese George Varughese J:

[1] After a full trial of the matter, I had on 20 December 2012 dismissed the plaintiff's suit with costs. I now set out the complete grounds for my decision.

Background

[2] The plaintiff was a supplier of electric power as a licensee under the Electricity Supply Act 1990 (ESA).

The defendant was a consumer of electricity that was supplied by the plaintiff under an Account No. 0231-00280097-09 at the defendant's industrial premises located at Plot 137 @ Lorong Perindustrian Bukit Minyak 11, Bukit Minyak Industrial Park, 1400 Bukit Mertajam, Pulau Pinang (defendant's premises).

[3] In this action, the plaintiff sought to recover from the defendant the sum of RM1,027,888.76 described at para. 12 of the statement of claim as "... jumlah penggunaan tenaga elektrik yang tidak direkodkan untuk tempoh dari bulan Julai 2006 hingga Ogos 2010 termasuk kos operasi dan kos jangka yang dihutangi ..."

[4] The plaintiff alleged that there was a "... pemeriksaan ke atas pepasangan meter/meter" carried out on 19 August 2010 at the defendant's premises where it was discovered that there was a "... pengusikkan pada pepasangan meter/meter seperti berikut:

(i) berlaku sambungan switch timer box dari armor kabel meter; A

(ii) terdapat emergency stop button yang mengawal arus S1 and S2 pada fasa kuning dan fasa biru;

(iii) nilai paparan meter tidak menunjukkan nilai sebenar berbanding arus masuk kabel; dan B

(iv) meter tidak merekodkan penggunaan arus fasa kuning dan biru.

(see para. 7 of the statement of claim).

C

[5] It was only in the opening statement and later in the submission of plaintiff's counsel, that the plaintiff's claim in this suit was expressly put forward as one brought pursuant to or premised upon s. 38(3), (4) and (5) of ESA to recover 'loss of revenue' occasioned to the plaintiff allegedly as a result of the 'pengusikkan' D (tampering) of the meter or meter-installation.

It needs to be pointed out too, the neither in (a) the letter of demand dated 6 October 2010 (P15), nor in (b) the bil elektrik (tambahan) (P15A), both issued by the plaintiff to the defendant, E was there any reference made to s. 38(3) of the ESA as the basis of the plaintiff's demand for the settlement of the said sum of RM1,027,888.76.

[6] It was the plaintiff's case that on 19 August 2012 an investigation or inspection had been carried out at the defendant's F premises by employees of the plaintiff attached to the plaintiff's special investigation unit (SEAL-Special Engagement Against Losses). It was thereat found that the meter and/or meter-installation at the defendant's premises to record the consumption or usage of electricity by the defendant, had been 'tampered' with G and was not recording the actual usage of power. It was alleged that the defendant had interfered with the meter or metering installation and prevented it from recording the proper or actual consumption of electricity at the defendant's premises.

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[7] According to the plaintiff, the key evidence which proved that there was 'tampering' as alleged and which the plaintiff's personnel had found at the defendant's premises were:

(a) the existence of a 'bypass' installed in respect two of the I three phase connections (namely to S1 (Phase-2/Kuning) and S2 (Phase-3/Biru)) to the current transformer, discovered when the floor below which the armor cable laid was hacked open by the investigators, and

(b) the discovery of a timer-box and an emergency stop button, which were used, to control, or in other words, engage or disengage the 'bypass'.

The offending items uncovered were tendered in court and admitted as exhs. P7, P8 and P9.

Trial

[8] Six witnesses gave evidence for the plaintiff. PW1, PW2 and PW4 were members of the SEAL team who had carried out the inspection at the defendant's premises on 19 August 2010 and detected the 'tampering'. The testimony of PW3, PW5 and PW6 was in respect of how the 'loss in revenue' claimed by the plaintiff was derived.

It was PW6's evidence that in calculating the quantum of 'loss of revenue', the error of recording ('ralat') which was found to be -69.9% (at the time of inspection after corrective steps taken) was relied upon and the 'Pengiraan Purata Penggunaan Sehari' (daily average basis) was the specific method applied in this particular case to obtain the sum claimed.

[9] The defendant relied on the testimony of three witnesses in support of their defence. DW2 and DW3, who were directors of the defendant, denied any knowledge of the alleged 'tampering'.

DW1, the Operations Manager of the defendant, while denying any knowledge of 'tampering' nevertheless admitted that he was present when the inspection took place and he signed the 'Borang Pemeriksaan Meter LPC Voltan Rendah' (P1), the 'Surat Pemberitahuan Pengambilan Bahan-Bahan Bukti' (P3) and the 'Pemakluman Semakan Meter Elektrik Oleh TNB' (P4) on behalf of the defendant after it was explained to him by the plaintiff's personnel that there had been detected irregularities in the recording of the usage of electricity by the meter installed at the premises.

DW1 stated that the meter itself was within a locked and caged enclosure only accessible to the plaintiff's staff and that he was told that only one phase of the connection (of the three phase connection) was found to have been involved.

DW1 and DW2 also stated that the defendant had not been prosecuted for any offence (theft of electricity), much less called to make any statement on the matter to the police or any relevant authority.

Issues

[10] In my assessment, after having heard witnesses and considered the submissions of respective counsel, there were three main areas of controversy that arose in this suit. They could be broadly categorised as follows:

(a) Issue of 'tampering' – Whether there was 'tampering of the meter and/or of the meter-installation which resulted in the 'under recording' of the actual consumption of electricity at the defendant's premises and whether it was for this court to determine the same.

(b) Quantum of 'loss of revenue' – Whether the quantum of the 'loss of revenue' suffered by the plaintiff had been established in accordance with s. 38(4) of the ESA; and

(c) Recoverability of 'loss of revenue' by the civil action – Whether the plaintiff was entitled pursuant to s. 38(3) ESA to recover any such 'loss of revenue' even if so established by virtue of s. 38(4) and (5) of the ESA.

Issue Of 'Tampering'

[11] In assessing this controversy and the respective submission of counsel on the subject, I wrestled with a further and more fundamental question. This instant suit was a civil action being brought and prosecuted pursuant to s. 38(3), (4) and (5) of the ESA. That fundamental question, in my view was whether in such circumstances, it was this court that was required to make any such finding or conclusion as to whether there was or was not 'tampering' of the meter/meter-installation, as alleged by plaintiff at the defendant's premises.

[12] This called for a proper appreciation and understanding of the scheme or order of processes envisaged by Parliament in enacting s. 37 and s. 38 of the ESA. Section 37 and s. 38 were found within Part IX title "OFFENCES AND PENALTY" of the legislation.

Section 37 and 38 of the ESA in its entirety is reproduced and set out in the schedule to this grounds of decision.

[13] On a closer and careful analysis of all the provisions comprised in s. 37 and 38 ESA, it was my conclusion that there were three distinct areas of processes contemplated and provided for by the legislature within those two sections of ESA. They were:

(a) The first area of process enacted the different types of offences pursuant to which any relevant offender as detailed there could be prosecuted and the consequential punishment to be imposed upon any such convictions obtained.

This formed the subject of s. 37(1) to (14) of ESA. Section 37(15) was a general overriding provision which was to apply where no specific punishment for an offence under ESA was provided for. Further s. 37(16) extended the liability for such offences to even include agents and servants of the offenders.

For convenience, it would not be wrong, to refer to this first area of process as the 'criminal provisions'.

(b) The second area of process enabled by those provisions of the ESA was where urgent disconnection of the supply of electricity was permitted in specific instances. This is discussed in further detail anon.

This was what was envisaged and which formed the subject of s. 38(1), (1A), (2) and (2A) of the ESA.

These provisions could be conveniently classified as the 'urgent disconnection of electricity' provisions.

To be noted here was the specific statutory stipulation that any such disconnection pursuant to s. 38(1) should not exceed three months, thus underscoring the use of those provisions in urgent cases. (see discussion of the Court of Appeal decision in *Claybricks & Tiles Sdn Bhd v. Tenaga Nasional Bhd* [2006] 4 CLJ 892).

(c) The third area of process covered in those provisions was in regard to the recovery of loss of revenue by a licensee by way of a civil action.

Section 38(3) enabled such a recovery by civil proceedings (see s. 38(5)) when a loss of revenue had been caused '... due to the offence committed under s. 37(1), 37(3) and 37(14) ...'

Sections 38(3), (4) and (5) of ESA encompassed this third envisaged process, which I would refer as the 'civil action' provisions.

[14] The three processes were therefore separate and distinct when those provisions were viewed in their proper perspective with reference to the underlying objectives and intended use of those provisions as elaborated above.

[15] Criminal provisions. A prosecution in respect of a suspected offence under any of the provisions of s. 37(1) to s. 37(14) of the ESA was within the purview of and was to be undertaken by the Suruhanjaya Tenaga (Energy Commission), according to a witness for the plaintiff.

It was not in dispute in the instant case that there was no such prosecution brought or a conviction obtained against the defendant in respect of any of the offences there.

[16] Urgent disconnection provisions. The rationale behind this separate process, as it was, was most instructively captured in the Court of Appeal judgment of Zulkefli Makinuddin JCA (as his Lordship then was) in the *Claybricks & Tiles's* case (*supra*) where it was stated as follows:

> Pada pandangan kami peruntukan *s. 38(1) Akta tersebut tidak memerlukan kesalahan dibuktikan dahulu* di Mahkamah sebelum tindakan memotong bekalan elektrik boleh dilakukan oleh TNB. Dalam hal perkara ini kami lebih cenderung untuk menerima dan bersetuju dengan tafsiran dan pandangan yang di buat dalam kes *Tan Yeong Kim lwn. TNB* [2000] 8 CLJ 629 di mana YA Hakim Alauddin Mohd Sharif (YA pada masa itu) telah menyatakan antara lain bahawa s. 38(1) Akta tersebut tidak memerlukan satu pembuktian kesalahan oleh mahkamah sebagai pra-syarat sebelum kuasa pemotongan dapat dilaksanakan oleh TNB sebagai pemegang lesen. Seterusnya YA Hakim menyatakan *ianya digubal sebegitu rupa untuk memberi kuasa efektif kepada TNB memberhentikan dengan segera sebarang kesalahan yang berlaku dan tidak dibiarkan berlarutan.*

A Kami perlu menyatakan di sini bahawa *peruntukan s. 38(1) Akta tersebut adalah jelas dan terang di mana proses mahkamah tidak diperlukan untuk menentukan sama ada sesuatu kesalahan telah dilakukan sebelum tindakan di bawah seksyen tersebut boleh diambil.* Sekiranya proses pembuktian kesalahan melalui mahkamah diperlukan ianya akan mengambil masa yang lama sebelum kuasa di bawah s. 38(1) dapat di gunakan. Kami berpendapat *s. 38(1) Akta tersebut telah diperuntukkan secara spesifik untuk menjaga kepentingan TNB dan membolehkan TNB bertindak cepat dan dengan itu dapat mencegah penyalahgunaan seperti pencurian bekalan elektrik* yang dibekalkan oleh TNB.

[17] This decision affirmed a licensee's (like TNB's) right to an urgent disconnection of electricity when circumstances so warranted without proof of any prior conviction under s. 37(1), 37(3) or 37(14) of ESA as a prerequisite. Such action could be availed of where as provided there in s. 38(1) "... any person employed by the licensee finds upon the premises evidence which in his opinion proves that an offence has been committed ...". The only precondition for such a drastic action to be taken was the subjective opinion formed by an employee of the licensee as to a likely offence under s. 37(1), s. 37(3) or s. 37(14) been committed.

However when contrasted with what was expressly stated in s. 38(3) – "The licensee may require the consumer to pay him for the loss of revenue due to the offence committed under s. 37(1), 37(3) and 37(14) ...", it could not escape one's attention, that there was a distinction intended by the legislature, in that the right to recover loss of revenue presupposed a conviction been entered on those offences in the first place against the consumer concerned (more about this).

[18] I could not therefore agree with counsel for plaintiffs who attempted to argue that so much of s. 38(1) which referred to the opinion of the licensee's employee even extended to apply to proceedings to be brought pursuant to s. 38(3) of the ESA. The contention that s. 38(3), s. 38(4) and s. 38(5) was qualified by or must be read together with s. 38(1) was wholly misconceived. There was a clear distinction to be drawn as between the different processes and the objectives behind them, on the one hand urgent disconnection – s. 38(1), and on the other hand what a licensee was enabled under s. 38(3) of the ESA to pursue by way of civil action.

It bears repetition, that this was the conclusion of the Court of Appeal in *Claybricks & Tiles*'s case cited above, where it was most emphatically held that s. 38(1) was enacted for a specific purpose to allow TNB to protect its interest expeditiously by urgently disconnecting electricity to prevent losses including theft of electricity; any such disconnection was in any event not to exceed three months, as already noted earlier. (the other instance when urgent disconnection could be taken was at the instance of the police in respect of gaming premises).

[19] Civil action provisions. The third process (s. 38(3), s. 38(4) and s. 38(5) of ESA) was a statutorily provided cause of action to recover 'loss of revenue' by civil proceedings. This was intended to be separate from the criminal proceedings under s. 37 of the ESA.

[20] In the result, it was my conclusion on the first issue listed above, that it was not for this court (adjudicating a claim in the civil action brought before it), to determine or make a finding whether there was or was not an offence committed under s. 37(1), s. 37(3) or s. 37(14).

This court was not, for sure, the forum to make any finding as to the commission of an offence under s. 37(1), s. 37(3) or s. 37(14). I was, for that reason, not inclined to enter into such an exercise and accordingly declined to do so here in this case.

[21] Nevertheless, if I was required to do that, with respect, I would only state that in my assessment of the evidence led before the court by the plaintiff, there was sufficient evidence to commence or initiate prosecution of the defendant for likely offence(s) under s. 37(3) and/or s. 37(14).

The discovery of (a) the concealed 'bypass' (under the floor) in respect of two of the three phase connection of electricity to the defendant premises, and (b) of the 'timer box' and 'stop button', all extraneous to any normal meter/meter-installation, all pointed towards a willful attempt to impact the meter/meter installation from recording the actual rate of consumption of electricity at the defendant's premises. The installation of the 'bypass', the 'timer box' and 'stop button' could not have occurred without the defendant's staff, servant or agents being complicit in placing them there.

A **Quantum of 'Loss of Revenue'**

[22] There was no question that a legislation may create a right to recover certain specific loss or provide that a party be compensated for specific reasons or acts, apart from the familiar
B recovery of 'damages' or 'compensation' under proceedings in 'contract' or in respect of 'tortious' claims.

Section 38(3) of the ESA, I was satisfied, is one such avenue created by law to allow a licensee under the ESA, like the plaintiff here, to recover 'loss of revenue' arising from or caused by any
C offence committed under s. 37(1), s. 37(3) and/or s. 37(14) (that is, conviction for tampering equipment, or preventing meter from duly recording consumption, damaging meter etc).

[23] As regards the computation of such quantum that was
D recoverable, it was provided in s. 38(4) that 'a written statement by an employee of the licensee duly certified by the licensee or any person certified by the licensee' as to:

(a) amount of loss of revenue; and

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(b) person liable to pay.

was to be *prima facie* evidence of the amount to be paid by the consumer to the licensee (TNB, in this case).

F **[24]** '*Prima Facie*' evidence (according to Sarker's *Law on Evidence* and on settled authorities) carried the meaning that it amounted to sufficient evidence to establish a fact which unless rebutted by acceptable evidence to the contrary, would be conclusive and binding on the counter-party.

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The plaintiff relied on P12, P13 and P14, certified by their relevant officers (PW3, PW5 and PW6 called as witnesses as well) to support the plaintiff's claim, as set out in the statement of claim.

[25] By virtue of the statutorily recognised '*prima facie*' effect of
H the evidence led in court, the burden then shifted on to the defendant to disprove the amount claimed by the plaintiff.

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In this respect, it need to be pointed out that it was the defendant's case that they were only liable to pay a further sum of 33% of the total billed sum for consumption of electricity at the defendant's premises for the period from 26 June 2006 to 19 August 2010. This was suggested or offered by the defendant as being the equivalent of the unbilled charges for that period (see defendant's letter of 9 August 2011 and the tabulation at p. 48 and p. 47 of the Common Agreed Bundle of Documents (part B); the letter was not marked 'without prejudice').

The defendant however failed to give details as to why or how the 33% value was chosen to apply to calculate the shortfall of 'electricity consumed' as a result of the meter not recording the actual rate of consumption of electricity at the defendant's premises.

[26] Further it was suggested for the defendants that the statement or computation of 'backcharges' submitted by the plaintiff did not take into consideration:

(a) the fact that the number of machines operated by the defendant could vary for day to day or during low-peak period of production at the defendant's premises; and

(b) intervening holidays and weekends, during that period.

[27] The question then for this court to decide was whether the defendant had sufficiently discharged the burden on them to displace the conclusiveness of the *prima facie* evidence tendered by the plaintiff.

Having given due consideration to the material and testimony before me, I was not satisfied that the defendant had displaced that burden. In my view, making mere suggestions as to possible or likely errors in the computation was not sufficient. To suggest only a 33% addition to the 'billed' usage amount to cover the shortfall of consumed electricity, was without support of any basis or a credible calculation thereto; this was purely an arbitrary figure which was adopted by the defendant.

[28] I was satisfied, on the evidence in this case, that the defendant had failed to disprove or challenge the formula or process employed in the computation of 'backcharges' that had

been presented by the plaintiff's officers. No inroads had been made by the defendant to demolish the basis or the appropriateness of the method used by the plaintiff in the calculation or deduction made as to at the amount of 'loss of revenue' due from the defendant, which was entitled to be recovered pursuant to s. 38(3), 38(4) and 38(5) of ESA.

It was my conclusion, on the second issue, that the amount as certified and adduced by the plaintiff as 'loss of revenue' should therefore stand as conclusive against the defendant, subject of course to, whether the plaintiff had met the requirements to recover the same; this was the third issue before the court as noted earlier.

Recoverability Of The 'Loss Of Revenue' By Civil Action

[29] Notwithstanding that the amount or quantum of the 'loss of revenue' had been established pursuant to provision of s. 38(4), the question that followed was whether this sum was indeed recoverable by the plaintiff by virtue of the express terms in s. 38(3) and s. 38(5) of ESA.

This was the ultimate question on which the plaintiff would or would not succeed in this civil action.

[30] As already highlighted earlier in s. 38(3) – the words used in the provision were: "The licensee may require the consumer to pay him for the loss of revenue due to the offence committed under s. 37(1), 37(3) and 37(14) ..."

'Offence committed' given its plain and literal meaning can only mean that there ought to be a finding of guilt and conviction under s. 37(1) or s. 37(3) or s. 37(14), in the first place.

[31] Any recourse under s. 38(3) could therefore be invoked, in my considered view, only when there was a conviction under a prosecution brought by Suruhanjaya Tenaga in separate proceedings (presumably in the criminal courts). This was a pre-condition that had to be satisfied by plaintiff before having resort to the enabling effect of s. 38(3) to bring a civil action to recover 'loss of revenue' caused by the acts of the offender under s. 37(1), s. 37(3) or s. 37(14) of ESA.

[32] I had occasion in another case, *Tenaga Nasional Berhad v. JCY HDD Technology Sdn Bhd* [2012] 1 LNS 168, to observe on this point as follows: A

> In my assessment, going by the plain and unambiguous statutory words used, the first and primary point to take note was that any recovery of 'loss of revenue' pursuant to s. 38(3) of the Act was hinged upon the commission of an offence under s. 37(1), 37(3) and 37(14). A priori therefore, there must be a conviction recorded against the defendant before any right to recover 'loss of revenue' could be taken or proceeded with by the plaintiff under s. 38(3) of the Act. The plain and precise words of the legislation called for a literal and strict construction to be given to that provision. B C
>
> ...
>
> The canons of interpretation of statutes (including 'purposive' reading for example) can only be availed of where the terms or words employed by the legislature in the statute created a doubt and the court had to opt for one meaning to the exclusion of another or others. This was trite ... D

[33] This position taken by me that there were two separate processes and prosecutions before separate courts contemplated by the s. 37 and s. 38 of the ESA (one criminal, the other civil proceedings) is fortified further if one was to refer to s. 41 of the ESA (the same legislation). Section 41 provided there that 'compensation for damages' may be ordered against an offender (there, who removes, destroys or damages, any installation etc) by the same court before which the offender was charged for those criminal act(s). Expressly in that section there was power granted for the two aspects, criminal prosecution and a civil claim, to be dealt with together at same time. E F G

There was no such similar provision found in respect of the criminal proceedings that was to be brought pursuant to any of the subsection in s. 37. The civil proceedings was clearly therefore intended by the legislature to be brought separately under s. 38(3) and s. 38(5) ESA only after a conviction under s. 37(1), s. 37(3), s. 37(14) had been obtained against the offender. H

[34] Recoverability by the plaintiff of any 'loss of revenue', by way of a civil action, in my considered opinion therefore, required or presupposed that there was a prior conviction under s. 37(1), I

37(3) or s. 37(14) of ESA. An offence had to be shown to have been 'committed' to premise the claim in the civil proceedings to be brought against the 'offender' pursuant to s. 38(3), s. 38(4) and s. 38(5).

[35] It was not in dispute that there was no such prosecution or conviction of the defendant for an offence under s. 37(1), s. 37(3) or s. 37(14) in the instant case. Accordingly it was my holding that the plaintiff could not sustain this civil claim in law, since the specific precondition to avail of the statutory cause of action under s. 38(3) of the ESA had not been met or satisfied.

It followed then that in any event, the plaintiff's claim failed on this ground.

Conclusion

[36] ESA was not a piece of social legislation which called for a liberal reading and interpretation. It had to be construed strictly. It is a piece of statute that regulated the power industry and provided for the respective responsibilities, rights and roles and the interface of activities not just between the Energy Commission on the one hand, and licensees (like the plaintiff, a corporate entity) on the other hand. The provisions of the ESA was also intended to protect the rights of consumers and the general public affected by the activities of the licensees (see for example s. 10 (power to enter on and examine land), s. 11 (power to enter on land for purposes of construction) and s. 16 (compensation)).

[37] As discussed and for the reasons stated above, firstly, it was definitely not for this court to adjudicate and determine whether an offence of 'tampering' under s. 37(1), s. 37(3) or s.37(14) had been committed by the defendant.

Secondly, notwithstanding that the presumption as regards of the quantum of the 'loss of revenue' had not been displaced by the defendant, the plaintiff was nevertheless precluded from any recovery of the sums claimed in this action, as there was no evidence before the court that the defendant had been convicted of an offence under s. 37(1), or s. 37(3) or s. 37(14) of the ESA as was required under s. 38(3) of the ESA.

[38] The plaintiff's claim was accordingly dismissed with costs.

Schedule

37. Offences

(1) Any person who tampers with or adjusts any installation or part thereof or manufactures or imports or sells any equipment so as to cause or to be likely to cause danger to human life or limb or injury to any equipment or other property shall be guilty of an offence and for each such offence shall, on conviction, be liable to a fine not exceeding one hundred thousand ringgit or to imprisonment for a term not exceeding five years or to both.

(2) Any person who by any rash or negligent act or omission causes damage to any person or property in respect of any installation or equipment or part thereof shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding three year or to both.

(3) Any person who in any manner dishonestly:

(a) abstracts electricity;

(b) consumes electricity;

(c) uses electricity;

(d) alters the index of any meter or other instrument used on or in connection with any installation of any supply authority or any licensed installation of recording the output or consumption of electricity; or

(e) prevents any such meter or instrument from duly recording the output or consumption of electricity.

shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding one hundred thousand ringgit or to imprisonment for a term not exceeding three years or to both.

(4) Any person who, in contravention of section 9, uses, works or operates, or permits to be used, worked or operated any installation shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding fifty thousand ringgit and to a further fine not exceeding one thousand ringgit for every day or part of a day during which the offence continues after conviction.

(5) Any person who, in contravention of section 9, supplies electricity from an installation to or for the use of any person shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding one hundred thousand ringgit, and to a further fine not exceeding one thousand ringgit for every day or part of a day during which the offence continues after conviction.

(6) Any licensee who without the express authority from the Commission supplies electricity or lays down any supply line or constructs any electrical work outside the area of supply specified in his license shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding five thousand ringgit, and any such unauthorized line or work may, after conviction, be removed by order of the Commission, and if such order is not complied with, the reasonable costs of such removal may be recovered from the licensee.

(7) Any licensee who without lawful excuse fails to comply with any term or condition expressed in the license shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding ten thousand ringgit and, to a further fine not exceeding one thousand ringgit for every day or part of a day during which the offence continues after conviction.

(8) Any person who fails or neglects to register any installation under section 21 shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding twenty-five thousand ringgit and a further fine not exceeding one thousand ringgit for every day or part of a day during which the offence continues after conviction.

(9) Any person who, without due authority, extinguishes or damages any public lamp or damages or defaces any post, bracket or other means of support of a public lamp shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding five thousands ringgit or to imprisonment for a term not exceeding one year or to both.

(10) Any person who without lawful consent of the supply authority or the licensee, as the case may be, affixes or causes to be affixed any advertisement, bill or notice or any paper against or upon, or otherwise defaces any building, post or bracket or other equipment or the enclosure thereof used for or in connection with any public installation shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding one thousand ringgit.

(11) Any person who willfully or negligently:

(a) cause energy to be diverted from its proper course to be wasted; or

(b) breaks, throws down, causes to fall or damages any supply line, post, pole, or other equipment, installation of any part thereof, as the case may be, connected with the supply of electricity.

shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding three years or to both.

(12) (a) No person shall without the lawful authority of the supply authority or the licensee, as the case may be, undertake any work or engage in activity in the vicinity of any electrical installation or part thereof in a manner likely to interfere with any electrical installation or to cause danger to any person or property.

(b) Any person who contravenes, this section shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding five thousand ringgit or to imprisonment for a terms not exceeding two years or to both.

(13) (a) No person shall install any electrical wiring or extension to existing wiring on any premises without first obtaining the approval in writing from a supply authority or licensee.

(b) Any person who contravenes this section shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding ten thousand ringgit or to imprisonment for a term not exceeding two years or to both.

(14) Any person who damages any meter or other instrument used on or in connection with any licensed installation for recording the output or consumption of electricity shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding two years or to both.

(15) Any person found guilty of any offence against this Act for which no penalty is expressly provided shall, on conviction, be liable to a fine not exceeding five thousand ringgit and, in the case of a continuing offence, to a fine not exceeding five hundred ringgit for every day or part of a day during which the offence continues after conviction.

(16) Whenever any agent or servant in the course of his employment does or omits to do any act the doing or the omission to do of which by his principal or employer would be an offence against this Act, such agent or servant shall be guilty of that offence, and his principal or employer and any person at the time of the act omission was in charge of the business in respect of which the act or omission occurred shall be guilty of that offence unless the principal or employer or such other person, as the case may be, proves to the satisfaction of the court that he took all reasonable means and precautions to prevent the act or omission.

38. Disconnection of supply of energy

(1) Where any person employed by a licensee finds upon any premises evidence which in his opinion provides that an offence has been committed under section 37(1), 37(3), or 37(14), the licensee or any person duly authorized by the licensee may, upon giving not less than twenty-four hours notice, in such form as my be prescribed, cause the supply of electricity to be disconnected from the said premises.

(1A) Notwithstanding any other provisions in this Act, where a police officer not below the rank of Assistant Superintendent applies to a supply authority or a licensee for the disconnection of the supply of electricity to any premises for a period not exceeding one calendar month under section 21A of the Common Gaming Houses Act 1953, the supply authority or the licensee or any person authorised by the supply authority or the licensee shall immediately disconnect or cause the supply of electricity to be disconnected from those premises; and

(2) If the supply of electricity has been disconnected under subsection (1), it shall be not reconnected until the licensee at his discretion gives permission of reconnection;

Provided that the period of disconnection shall not exceed three months.

(2A) Notwithstanding subsection (2), if the supply of electricity has been disconnected under subsection (1A), it shall not be reconnected without the written permission of a police officer not below the rank of Assistant Superintendent.

38 (3) The licensee may require the consumer to pay him for the loss of revenue due to the offence committed under section 37(1), 37(3) and 37(14) and any expenses incurred by the licensee under this section including expenses incurred in respect of the reconnection of electricity supply.

(4) A written statement by an employee of the licensee duly certified by the licensee or any person authorized by the licensee specifying:

(a) the amount of loss of revenue or the expenses incurred by the licensee; and

(b) the person liable for the payment thereof

shall be *prima facie* evidence of the payment that has to be made by the consumer under subsection (3).

(5) The amount stated in the written statement shall, within the period specified in the statement, be due and payable to the licensee and in default of payment such amount shall be recoverable by civil action in a court.